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In The
Supreme Court of The United States
October Term 1994

JAMIL SALEH d/b/a
KB'S LIMITED FINE FOODS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Whether an innocent sole proprietor of a grocery store can be permanently disqualified from the food stamp program for a violation by the store's part-time clerk.

LIST OF PARTIES

All parties to this action appear in the caption of the case: Jamil Saleh d/b/a/ KB's Limited Fine Foods, a sole proprietorship, and the United States of America, by and through the actions of the United States Department of Agriculture.

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REFERENCE TO OPINIONS

Unpublished opinion of the United States Court of Appeals for the Fourth Circuit, decided December 5, 1994.

Unpublished opinion of the United States District Court for the Eastern Division of North Carolina, Wilmington Division, decided December 20, 1993.

Decision of the United States Department of Agriculture, Food and Nutrition Service, dated October 27, 1992.

Decision of the United States Department of Agriculture, Food and Nutrition Service, dated August 20, 1992.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourth Circuit entered its judgment in this case on December 5,

1994. Plaintiff petitioned for rehearing on December 20, 1994. The Court of Appeals denied the petition for rehearing on January 5, 1995.

Jurisdiction is conferred on this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. Section 1254(1).

RELEVANT STATUTORY AND REGULATORY SECTIONS

7 U.S.C. 2021 (set out in appendix)

7 CFR 278.6(i) (set out in appendix)

STATEMENT OF THE CASE

The United States Court of Appeals for the Fourth Circuit affirmed the decision by the United States District Court for the Eastern District of North Carolina, upholding the determination of

the defendant, United States of America, by and through the United States Department of Agriculture, Food and Nutrition Service, (USDA, FNS), to permanently disqualify the plaintiff, Jamil Saleh, d/b/a KB's Limited Fine Foods, from further participation in the food stamp program.

Jamil Saleh, d/b/a/ KB's Limited Fine Foods, is a small neighborhood grocery store, operating since May, 1987, in Wilmington, North Carolina. Plaintiff, Jamil Saleh, was granted a license to participate in the food stamp program administered by the USDA, FNS and has continuously operated his store with a food stamp license since that time.

On July 31, 1992, the USDA asserted that KB's had violated the food stamp regulations promulgated by the USDA and

that the department was considering permanently disqualifying the firm from further participation in the food stamp program. The defendant-appellee asserted that Dameen Mohd Qasim Mohammed, a part-time clerk employed at KB's Limited Fine Foods, gave an undercover agent from the USDA cash in exchange for food stamp coupons on two occasions, and that this constituted a violation of 7 C.F.R. Section 278.2(a).

Plaintiff-appellant, by counsel, objected to the permanent disqualification and asked that a civil money penalty be imposed. In support of his request for a civil money penalty in lieu of permanent disqualification, plaintiff-appellant submitted his sworn testimony regarding his compliance policy and training efforts. Plaintiff-

appellant presented affidavits from Dameen Mohd Qasim Mohammad, the former clerk, wherein Mr. Mohammad admitted that he pled guilty to one count of food stamp fraud in connection with the alleged violations, stated that he paid for the food stamps himself, and declared that Jamil Saleh had no knowledge of his illegal activities, and from Jamil Saleh, wherein the owner stated that he is fully aware of the laws and regulations regarding the food stamp program and that he, doing business as KB's Limited Fine Foods, has never violated any of those laws or regulation, that he has never had any full time employees, that he has employed part-time employees in the past, including Dameen Mohd Qasim Mohammad, that he makes certain that each of the part-time clerks he employs are made

aware of the laws and regulations regarding the food stamp program, that he personally oversees the actions of the part-time clerks and attempts to make certain that they do not violate the food stamp regulations, and that he knew nothing about any alleged violations of the food stamp laws until Mr. Mohammad, his former clerk, was first charged with violating the food stamp laws.

The USDA denied the request and plaintiff-appellant asked for a review of the decision, as provided by the regulations. The review upheld the decision to permanently disqualify the plaintiff. Having exhausted his administrative remedies, plaintiff-appellant filed his complaint for de novo judicial review in the United States District Court for the Eastern District

of North Carolina. The district court granted the defendant's Motion for Summary Judgment and the United States Court of Appeals for the Fourth Circuit affirmed.

BASIS OF FEDERAL JURISDICTION

This Court has jurisdiction of this matter pursuant to 28 U.S.C. Section 1331 and 7 U.S.C. 2023.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO REVERSE THE DECISION OF THE COURT BELOW BECAUSE AN INNOCENT SOLE PROPRIETOR OF A GROCERY STORE SHOULD BE ASSESSED A CIVIL MONEY PENALTY IN LIEU OF PERMANENT DISQUALIFICATION FROM THE FOOD STAMP PROGRAM FOR A VIOLATION BY THE STORE'S PART-TIME CLERK

A. THE PLAINTIFF-APPELLANT SUBMITTED SUBSTANTIAL EVIDENCE DEMONSTRATING THE ESTABLISHMENT AND IMPLEMENTATION OF AN EFFECTIVE COMPLIANCE POLICY AND PROGRAM TO PREVENT VIOLATIONS

OF THE FOOD STAMP PROGRAM, IN COMPLIANCE WITH 7 CFR 278.6(i)

7 U.S.C. Section 2021(b), as amended, provides that stores licensed to participate in the food stamp program may be permanently disqualified upon the first occasion of a disqualification based on trafficking in coupons except that a civil money penalty may be imposed in lieu of permanent disqualification if the store owner shows that he was not involved in nor benefitted from the violations and that he had in place an effective policy and program to prevent violations of the Act and regulations. 7 U.S.C. 2021(b)(3).

The implementing regulations, at 7 C.F.R. 278.6(i) provide four criteria that a store must meet to be eligible for a civil money penalty in lieu of permanent disqualification. These four

criteria are 1) an effective compliance policy, 2) in place prior to the violations, 3) an effective personnel training program and 4) no involvement by the owner in the violation.

In the instant case, the Court of Appeals found that the evidence presented by KB's showed that KB's complied with three of the four criteria listed in 7 C.F.R. 278.6(i). The court found that plaintiff-appellant failed to show compliance with 7 CFR 278.6(i)(2), which requires evidence of training activity of employees including the clearly imparted instruction that the exchange of food stamps for cash is prohibited.

The affidavit submitted by the plaintiff-appellant states in part:

> "That I have no full time employees, nor have I ever had a full time employee. That I have one part-time employee as

> a clerk and that I currently have a different part-time employee as a clerk. That I made sure, and continue to make sure, that each of these part-time clerks were and are aware of the laws and regulations regarding the food stamp program, especially that the exchange of food stamps for cash and for non-food items are violations of the food stamp laws. That to the best of my ability, I oversee the actions of these part-time clerks and attempt to make sure that they are not violating any of the laws or regulations of the food stamp program."

Affidavit of Jamil Saleh. Plaintiff-appellant submits that he has presented the only evidence that exists of his training, and that to require more from him means that he, and other sole proprietors, can never meet the requirements of the regulations, as the court below has interpreted them.

The plaintiff-appellant is a sole proprietorship running a small store.

Mr. Saleh is the owner and operator. He is there every day from opening to close. He has documented that he is aware of the rules and regulations of the food stamp program and that he makes certain that his part-time clerks, if any, are aware of and trained to be knowledgeable in the rules and regulations.

The nature of plaintiff-appellant's business is not conducive to formal written policies or training documents.

> "The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining standards

> and procedures to be followed by its employees and other agents."

United States Sentencing Guidelines, Section 8A1.2, Application Note 3(k). Plaintiff-appellant submits that the proper interpretation of the food stamp regulations should apply this provision of the United States Sentencing Guidelines to the instant case. It is not rational to expect a sole proprietorship to have written memoranda of the times he met with any of his occasional part-time employees. Neither is it practical for a solely run business to generate documentation regarding its policies and procedures. A sole proprietorship or small business certainly is expected to obey the law and have compliance and prevention programs and policies in place where required but

the formality of the proof of such programs is necessarily greatly reduced when the organization is a solely run business such as KB's. The plaintiff has complied with the regulations at 7 C.F.R. 278.6(i) even if his documentation is not as voluminous as one would expect from a store with several dozen employees.

Recently, Ghattas v. United States, 40 F.3d 281, 285 (8th Cir. 1994) held that the compliance policy requirement of 7 C.F.R. 278.6(i) was extremely impractical for a small food store. "These elaborate requirements may be appropriate to ensure the compliance efforts of a two-hundred store supermarket chain. They seem unsuitable for a one-clerk store in a low income trading area." Ghattas, 40 F.3d at 285. The regulations require documentation

that simply does not exist in a small business.

The decision of the Fourth Circuit in the instant case is in conflict with Freedman v. USDA, 926 F.2d 252, 257 (3rd Cir. 1991). In Freedman, the store owner presented evidence attesting to her training in the form of affidavits. Id.[1] The court found that the store owner had implemented an effective program to prevent violations of the food stamp

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[1] The court in Ghattas, supra, cited Freedman, noting that the FNS imposed a civil money penalty in that case, based on affidavits attesting to the store owner's training. "This suggests that the (USDA) ignores its virtually unsatisfiable regulations at its pleasure. That practice is a form of bureaucratic tyranny...." Ghattas, supra, at 285 n.5. The plaintiff in Ghattas failed to request a civil money penalty. Id. at 283.

regulations. Id.[2]

Similarly, Jamil Saleh, d/b/a KB's Limited Fine Foods, has submitted substantial evidence, in the form of affidavit, demonstrating the establishment and implementation of an effective compliance policy and program to prevent violations of the food stamp program in compliance with 7 C.F.R.

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[2]The issue before the court in Freedman was whether the store owner could be subject to any penalty. "The fact that the civil money penalty was to be imposed only if it is determined that a store owner had an effective policy to prevent violations clearly indicates that Congress intended 'innocent' store owners to be subject to the penalties...." Freedman, supra, at 259. Plaintiff-appellant is not now, nor has he ever, alleged that he, doing business as KB's Limited Fine Foods, should not be responsible for the acts of his employee. Plaintiff-appellant vehemently contests the imposition of the harsh penalty of permanent disqualification when he has shown, in the only possible way for him to show, that he had an effective preventive policy in place.

278.6(i).

B. PERMANENT DISQUALIFICATION IS NOT WARRANTED WHEN THE OWNER IS NOT INVOLVED IN THE VIOLATION

Congress intended the 1988 amendments to 7 U.S.C. 2021(b) to allow a store to be assessed a civil money penalty in lieu of permanent disqualification because of its concern that permanent disqualification was not fair where the trafficking violation occurs absent the owner's involvement. H.R. Rep. No. 828, 100th Cong. 2nd Sess. 27-28 (1988); 54 Fed. Reg. 31810. This Court has never had an occasion to review the permanent disqualification of an innocent store owner under 7 U.S.C. 2021(b).

Case law from the lower courts prior to the 1988 amendments had overwhelmingly held that permanent disqualification is

not warranted when the owner is not involved in the violation.[3] Where the owners were shown to have participated to some extent in the prohibited

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[3] See e.g., R Ranch Market Corp. v. United States, 861 F.2d 236, 241 (9th Cir. 1988) (holding that a store may not be disqualified where the employee acts solely for his personal gain and actively conceals his conduct from the owner); Badwan v. United States, 541 F.2d 1388, 1391 (6th Cir. 1976) (holding that the actions of an employee were to his own advantage and were not the result of improper training, inadequate explanation or negligent supervision of employees but the result of a single employee's criminal intent); Ghosein v. USDA, 616 F.Supp. 857, 859 (E.D. Mo. 1985) (holding that the FNS had improperly disqualified the store owner from participation in the food stamp program where he was the sole owner of the grocery store when his brother-in-law exchanged cash and jewelry for food stamps from an undercover officer and where it was not shown that the store owner had participated in or had knowledge of the transaction); and Plaid Pantry Stores, Inc. v. United States, 612 F.Supp. 680, 687 (D.C. Or. 1985), aff'd 799 F.2d 560 (9th Cir. 1986)(holding that the store owner did everything it could possibly do to comply with the food stamp regulations).

transactions, permanent disqualification is the appropriate sanction.[4]

Although the issue in the cases decided before the 1988 amendments was the decision between disqualification or no penalty at all, plaintiff-appellant submits that the cases are relevant to the instant case because of the harshness of permanent disqualification, verses the monetary penalty. Permanent disqualification is a harsh economic penalty. A significant number of plaintiff-appellant's customers are food

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[4] See e.g. Yousef v. United States, 647 F.Supp. 127 (M.D. Fla. 1986)(upholding disqualification where the store owner was involved in the violation); Jouder v. United States, 783 F.2d 176, 178 (10th Cir. 1986)(upholding disqualification where there was a minimum of supervision and oversight of the store operations by the store owner); and Haskell v. USDA, 930 F.2d 816 (10th Cir. 1991)(upholding disqualification where the co-owners of the store participated in the violations).

stamp participants and he will lose those customers if he is no longer able to participate in the food stamp program. While this is a harsh economic penalty to plaintiff-appellant, the consequences to those customers may be severe in terms of their access to other stores that accept food stamp coupons.

Recently, United States v. Truong, 860 F.Supp. 1137 (E.D. 1994) upheld a permanent disqualification where the owner was not involved. The store owner, however, failed to timely request a civil money penalty, and the court held that the owner could not avoid permanent disqualification. Id. at 1141. Similarly, Holmes v. United States, 868 F.Supp. 1348 (M.D. Ala. 1994) upheld permanent disqualification, but the store owner did not request a civil money

penalty in lieu of permanent disqualification. Id. at 1353.[5]

There is no evidence in the instant case that Jamil Saleh was in any way involved in the alleged transactions involving the employee Dameen Mohd Qasim Mohammad; all of the evidence shows that Jamil Saleh d/b/a KB's Limited Fine Foods did everything he could to prevent violations of the food stamp laws. Permanent disqualification is not warranted where, as here, the owner was not involved in the violations.

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[5]In Holmes v. United States, 815 F.Supp. 429 (M.D. Ala. 1993), the court initially granted the plaintiff's application for administrative stay and expressed concern that 7 U.S.C. 2021(b) violates an innocent store owner's due process under the Fifth Amendment because it imposes strict liability with no recourse to prove innocence. Id. at 432. At a later hearing, the court found that its due process concerns were alleviated. Holmes, 868 F.Supp., at 1355.

SUMMARY

For the foregoing reasons, plaintiff-appellant petitions this Court to grant certiorari to review the permanent disqualification of plaintiff-appellant's further participation in the food stamp program.

This the 30th day of March, 1995.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari and Appendix was served upon the following by depositing the same in the United States mail, first-class postage prepaid to:

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Solicitor General
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This the 30th day of March, 1995.

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Jamil Saleh, d/b/a KB's Limited Fine Foods,
Plaintiff-Appellant,

v.

United States of America
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Wilmington.
James C. Fox, Chief District Judge.
(CA-92-176-7-F)

Argued: September 29, 1994

Decided: December 6, 1994

Before MICHAEL and MOTZ, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Maura Ackerman McCaughey, ZIMMER & ZIMMER, Wilmington, North Carolina, for Appellant. Charles E. Hamilton, III, Assistant United States Attorney,

Raleigh, North Carolina, for Appellee. ON BRIEF: Janice McKenzie Cole, United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellant Jamil Saleh, d/b/a KB's Limited Fine Foods, operates a small grocery store in Wilmington, North Carolina. Saleh participated in the Food Stamp Program administered by the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS). Saleh's one part-time clerk -- without Saleh's knowledge or authorization -- bought $300 worth of food stamps for $170 cash in two transactions. These illegal acts subjected both the clerk and Saleh to penalties. See 7 U.S.C. §§2021, 2024 and 7 C.F.R. §278(i). The clerk was prosecuted and the FNS permanently disqualified Saleh from participation in the Food Stamp Program. Saleh sought

judicial review of his disqualification by filing a complaint in the United States District Court for the Eastern District of North Carolina. On cross-motions for summary judgment, the district court concluded that Saleh failed to establish that he had an effective compliance policy and program to prevent violations of the Food Stamp Program. The district court upheld Saleh's disqualification, acknowledging that "[t]he result indeed, is harsh." The result is very harsh, but the regulations leave no room for mercy in this case. We must affirm.

I.

This case results from a USDA undercover operation aimed at rooting out illegal food stamp transactions. On August 28, 1991, USDA undercover agent Mark Wells entered Saleh's store and told

the part-time clerk, Dameen Mohammad, that he (Wells) had $100 worth of food stamps he wanted to sell. Mohammad offered Wells $60 and Wells accepted. Mohammad then walked to the cash register and asked another man (who was never identified) to get $60 from the register. After being handed the money, Mohammad completed his deal with Wells. A week later Wells went to Saleh's store again and sold Mohammad another $200 worth of food stamps for $100 cash. In July 1992, Mohammad pled guilty to one count of unlawful possession of food stamps, in violation of 7 U.S.C. §2024. The district court sentenced Mohammad to 18 months probation, fined him $1,000, and ordered him to pay $200 restitution.

On July 31, 1992, the FNS notified Saleh (1) that he was liable for Mohammad's "trafficking (exchange of food

stamps for cash) violations" and (2) that it was considering permanently disqualifying Saleh and his store from the Food Stamp Program. Saleh responded, requesting that he be sanctioned with a civil money penalty in lieu of disqualification. See 7 C.F.R. §278.6(e)-(f); 7 U.S.C. §2021(b)(3)(B).

In support of his request for a lesser sanction, Saleh submitted two affidavits, his and Mohammad's. Saleh stated or indicated the following: (1) he did not know about, did not approve of, and did not benefit from Mohammad's food stamp trafficking; (2) no other food stamp violation had ever occurred at his store; (3) his only help was a part-time clerk; (4) he made sure that the clerk knew about the laws and regulations regarding the Food Stamp Program; and (5) he always tried to supervise his

part-time clerk to insure compliance with the laws and regulations. Mohammad's affidavit totally supported Saleh. Mohammad swore that he used his own money to buy the food stamps and that Saleh knew nothing of his (Mohammad's) illegal activities.

FNS's acting office-in-charge in Raleigh denied Saleh's request for a civil money penalty in lieu of disqualification as follows:

> It is our finding that there is not substantial evidence that your firm had an effective policy and program in effect to prevent violations. You failed to submit documentation of training activity through dated training records and records of dates training sessions were conducted as required by section 278.6(I)(2) [sic] of the regulations.

The officer imposed permanent disqualification. Saleh then sought and was granted review of his disqualification by the Director of FNS's

Administrative Review Division. An administrative review officer sustained the permanent disqualification.

Saleh next filed a complaint in federal district court, seeking judicial review of his permanent disqualification under 7 U.S.C. §2023(a).[1] In awarding summary judgment to the government, the district court concluded "that [Saleh] has not supplied 'substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the [Food Stamp] Program.' 7 C.F.R. §278.6(i)." According to the district court, Saleh was not eligible

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[1]A district court review de novo the FNS's determination that its regulations were violated. 7 U.S.C. §2023(a); Cross v. United States, 512 F.2d 1212, 1217-1219 (4th Cir. 1975) (in banc).

for consideration of a civil money penalty in lieu of permanent disqualification. Thus, the sanction stood. Saleh appeals, and we review de novo the district court's award of summary judgement to the government.

II.

We begin by looking at the applicable statute and regulations. Section 2021 of the Food Stamp Act instructs the Secretary of Agriculture to disqualify permanently a store found trafficking in food coupons, unless (1) the owner neither knew of nor benefited from the trafficking and (2) the store had an "effective policy and program" to prevent violations of the Act. 7 U.S.C. §2021(b)(3)(B). If the store owner proves, by substantial evidence, both innocence and an effective compliance policy and program, then the Secretary

has the discretion to impose a civil money penalty in lieu of disqualification. Id.[2]

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[2]The pertinent text of 7 U.S.C. §2021 is as follows:

§ 2021. Civil money penalties and disqualifications of retail food stores and wholesale food concerns

. . .

(b) Period of disqualification

Disqualification . . . shall be --

(3) permanent upon --

. . .

(B) the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern, except that the Secretary shall have the discretion to impose a civil money penalty of up to $20,000 for each violation (except that the amount of civil money penalties imposed for violations occurring during a single investigation may not exceed $40,000) in lieu of disqualification under this subparagraph, for such purchase of coupons or trafficking in coupons or cards that constitutes a violation of the provisions of this chapter or the regulations issued pursuant to this chapter, if the Secretary determines that there is substantial evidence (including evidence that neither the ownership nor management of the store or food concern was aware of, approved, benefitted from or was involved in the conduct or approval or the violation) that such store or food concern had an effective policy and program in

Turning to the FNS regulations, section 278.6(e)(1)(i) provides for permanent disqualification of a store when its personnel have trafficked in food stamps. The regulations set forth extensive criteria under which an innocent owner can avoid permanent disqualification by proving an effective policy and program to prevent food stamp violations. 7 C.F.R. §278.6(i).[3]

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effect to prevent violations of the chapter and the regulations . . .

[3]7 C.F.R. 6(i)'s criteria are as follows:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location

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where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Neither the firm ownership nor management were aware of, approved, benefitted from, or were in any way involved in the conduct or approval or trafficking violations . . .

> (1) Compliance policy standards. As specified in Criterion 1 above, . . . FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 . . . . As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness of the firm's policy and program to ensure FSP [Food Stamp Program] compliance and to prevent FSP violations, FNS may consider the following:

(i) Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;

(ii) Documentation of the development and/or continued operation of a firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregulatirites committed by firm personnel;

(iii) Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations;

(iv) The nature and scope of the violations charged against the firm;

(v) Any record of previous firm violations under the same ownership or management; and

(vi) Any other information the firm may present to FNS for consideration.

(2) Compliance training program standards. As prescribed in Criterion 3 above, the firm shall have developed and implemented an effective training program for all managers and employees on the

III.

The statute and regulations present us with two dispositive questions in this case. The first questions is: did Saleh know of or benefit from the trafficking of his part-time clerk, Mohammad. The second question is: did Saleh have an effective compliance policy and program. If the answer to the first question is "yes" or the answer to the second question is "no", then Saleh's permanent disqualification must stand.

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acceptance and handling of food coupons in accordance with this part 178. A firm which seeks a civil money penalty in lieu of a permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s).

The first question is easily answered "no" in Saleh's favor. The undisputed Saleh and Mohammad affidavits establish that Saleh neither knew of nor benefited from Mohammad's trafficking.

Answering the second question is more difficult, but the answer is ultimately "no" and therefore fatal to Saleh's case. The regulatory criteria for proving an effective compliance policy and program plainly favor written and dated training manuals, logs and policies. See 7 C.F.R. §278(i). Criterion 1 (development of an effective policy) and criterion 2 (policy and program in operation prior to violation), however, permit consideration of "[t]he nature and scope of the violation charges," the prior "record" of the firm, and "any other information the firm may present." Id. at §278(i)(1). Here,

information responsive to these factors appears to favor Saleh. His store's prior record was clean, and he neither knew about nor benefited from Mohammad's limited violations.

Saleh, however, has not provided the documentation required under criterion 3 (effective personnel training program). Criterion 3 must be satisfied as follows:

> A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s).

7 C.F.R. §278.6(i)(2) (emphasis added).

Saleh did not submit any dated training curricula. His conclusory affidavit did not provide any dates of

training sessions for Mohammad, not did his affidavit even provide the dates of Mohammad's employment. Finally, Saleh did not provide any contemporaneous documentation of Mohammad's participation in training. Saleh argues that the excessive paperwork required by the criteria is impractical and crippling for a small, owner-operated grocery store with one part-time employee.[4] Criterion 3, however, allows no exception. Saleh did not meet criterion 3, and therefore he did not establish that he had an "effective compliance policy and program" under the statute as implemented by the regulations. Accordingly, Saleh does not qualify for any sanction short of permanent disqualification.

IV.

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[4]The government says that the FNS has publications available which firms may use in their training programs.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

No. 92-176-CIV-7-F

JAMIL SALEH, d/b/a/ KB'S LIMITED FINE FOODS, Plaintiff,	)	
v.	)	. O R D E R
UNITED STATES OF AMERICA, Defendant.	)	

This matter is before the court on cross motions for summary judgment on plaintiff's request for de novo review of the decision by the United States Department of Agriculture, Food and Nutrition Service (USDA, FNS) to permanently disqualify plaintiff from further participation in the federal food stamp program. 7 U.S.C. §2023(a). The parties agree that no genuine issue of material fact exists, and that the case appropriately may be resolved by summary judgment pursuant to Rule 56, Fed. R. Civ. P. See e.g., Freedman v. United

State Dept. of Agriculture, 926 F.2d 252, 261 (3d Cir. 1991) ("de novo review is compatible with a summary judgment disposition if there are no material facts in dispute); accord Miller v. Federal Deposit Insurance Corp., 956 F.2d 58, 60 (4th Cir. 1992)

Background Facts

Since May, 1987, plaintiff, Jamil Saleh, has operated KB's Limited Fine Foods in Wilmington, North Carolina. KB's is a sole proprietorship and Saleh is present on the premises nearly every day. Prior to the incident in question, Saleh had never been charged with any food stamp violations.

On July 31, 1992, Saleh received a letter from the USDA FNS Acting Officer-in-Charge, R. Calvin Thompson, stating that it was the agency's contention that the plaintiff had violated the food stamp

regulations and that the USDA was considering permanently disqualifying KB's from further participation in the food stamp program. Thompson wrote that Dameen Mohd Qasim Mohammed, a part-time clerk employer at KB's, gave an undercover agent from the USDA cash in exchange for food stamp coupons on two occasions, in violation of 7 C.F.R. §278.2(a).

Plaintiff objected to permanent disqualification from the program and requested, instead, that a warning letter pursuant to §278.6(e)(7), or a civil money penalty pursuant to §278.6(i) be imposed. In support of his request, plaintiff presented his affidavits in which he stated that he has no full-time employees, had no personal knowledge of Mohammad's conduct that he did not benefit from it, that he had in place an

effective policy to prevent food stamp violations, and that he oversees the actions of his part-time clerks. Mohammad also submitted an affidavit in support of Saleh.

Nevertheless, on August 20, 1992, Acting Officer-in-Charge Thompson notified Saleh that he was being permanently disqualified. Plaintiff sought and obtained review of the decision by the Director of the Administrative Review Division of the FNS. Administrative Review Officer, Grady W. Smithey, Jr., upheld Thompson's decision by letter of October 27, 1992, in which he relied on "internal U.S.D.A. policy guidelines." Having exhausted his administrative remedies, plaintiff filed the instant action on December 1, 1992, seeking de novo review of the USDA's decision, pursuant to 7 U.S.C. §2023(a).

Analysis

Before its amendment effective October 1, 1988, 7 U.S.C. §2021(b) required that a first occasion of the purchase of coupons or the trafficking thereof carried a penalty of mandatory permanent disqualification from participation in the food stamp program. E.g., Grocery Town Market, Inc, v. United States, 848 F.2d 392 (3d Cir. 1988); Murry's Steaks, Inc. v. United States of America, 1988 WL 6818 (4th Cir. Jan 25, 1988) (UP). However, the 1988 amendment gave the Secretary discretion to impose a civil money penalty in lieu of permanent disqualification for trafficking violation "if the Secretary determines that there is substantial evidence that such store or food concern had an effective policy and program in effect to prevent violations of this chapter and

regulations." 7 U.S.C. §2021(b) (1988). The Third Circuit Court of Appeals has observed that

> section 2021(b) presumes that the penalty for even the first trafficking violation will be permanent disqualification. It is only if and when the store submits substantial evidence to prove that it has an effective policy to prevent violations that the civil penalty can be considered.

Freedman, 926 F.2d at 262 (emphasis in original). The only question before this court is whether the undisputed evidence of record constitutes, as a matter of law, "substantial evidence that [KB's] had an effective policy and program in effect to prevent violations of the food stamp laws and regulations.

The federal regulations which implement §2021(b), include 7 C.F.R. §278.6(i) (1990), which provides criteria by which the FNS is to determine whether imposition of a civil penalty is

warranted in lieu of permanent disqualification:

> In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:
>
> Criterion 1: The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and
>
> Criterion 2: The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and
>
> Criterion 3: The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and
>
> Criterion 4: Neither firm ownership nor management were aware of, approved, benefitted from, or were in any way involved in the conduct or approval of trafficking

violation.

7 C.F.R. §278.6(i) (1990). These criteria include both "compliance policy standards" and "compliance training program standards." Id.

The compliance policy standards contemplate that, as to Criterion 1, the FNS "shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with [regulations] on the proper acceptance and handling of food coupons." Id. Plaintiff contends that he has met the standards for this criterion by setting forth his policy in his affidavits and stating that his business is a sole proprietorship which he runs himself. He contends that in such an operation, there is no need for written memoranda of store policy and procedures. However, the

regulations dictate that the policy statements referred to shall be considered "only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." Id. Here, the plaintiff has acknowledged that, due to the nature of his operation, he saw no need for written memoranda of policies and procedures.

As to Criterion 2, the compliance policy standards suggest that the FNS consider the following:

> (i) Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;
>
> (ii) Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregularities

committed by firm personnel;

(iii) Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations;

(iv) The nature and scope of the violations charged against the firm;

(v) Any record of previous firm violations under the same ownership or management; and

(vi) Any other information the firm may present to FNS for consideration.

Id. The documentation provided herein was contained in Saleh's affidavit, which declared, inter alia:

(5) That I am fully aware of the laws and regulations regarding the food stamp program and the KB's Limited Fine Foods has never violated any of those regulations.

(6) That I have no full time employees, nor have I ever had a full time employee.

(7) That I have had one part-time employee as a clerk and that I currently have a different part-time employee as

a clerk.

> (8) That I made sure, and continue to make sure, that each of these part-time clerks were and are aware of the laws and regulations regarding the food stamp program, especially that the exchange of food stamps for cash and the redemption of food stamps for non-food items are violations of the food stamp laws.
>
> (9) That to the best of my ability, I oversee the actions of these part-time clerks and attempt to make sure that they are not violating any of the laws or regulations of the food stamp program.

Plaintiff points out that he fired Mohammad, that the nature and scope of KB's violations was limited, that it remains his policy not to commit food stamp violations, and that it was his first offense. There is no evidence, however, of any documentation of procedures for internal review of employees' compliance with regulations.

With regard to compliance training

program standards, the regulations require that a

> firm which seeks a civil money penalty in lieu of a permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violations(s)

7 C.F.R. §278.6(i). The regulations go on to describe in detail the requirements for training programs, including the suggested frequency thereof and an offer of written materials available through FNS.

Plaintiff contends that he has documented his compliance with the training program requirement by his affidavit which states that he makes sure that his part-time clerks are aware of

the laws and regulations regarding food stamps. However, he reiterates his contention that, as a sole proprietor who is at the store "every day from opening to close," he has done all he can to train his employees. However, the regulations plainly require more.

Plaintiff complains that the Secretary's position -- that, since a violation occurred, the compliance policy must not have been effective -- begs the question. However, that position necessarily relies on the plaintiff's own assertion that his method of training and ensuring compliance was to be present nearly all the time and to "oversee the actions of" the clerks, and that written policies and formal training sessions were unnecessary in his operation. As to Criterion 4, plaintiff has supplied substantial evidence that he was not

aware of, and did not approve of or benefit from the food stamp violations.

Keeping in mind, as plaintiff acknowledges, that "[f]or trafficking violations, there is no other penalty available other than permanent disqualification unless the store can show that it had an effective preventative policy in place, "Plaintiff's Memorandum in Support of Motion for Summary Judgment at 13, the court concludes that the plaintiff has not supplied "substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program." 7 U.S.C. §278.6(i). In so deciding, the court acknowledges plaintiff's contention that, in his opinion, the nature of his operation does not require formal written

policies or training. The USDA FNS obviously felt otherwise in establishing its regulations, which do not provide exceptions for stores such as KB's.

The result, indeed, is harsh. However, by the 1988 amendment, Congress permitted only a narrow and well-defined alternative to the penalty of mandatory permanent disqualification. The burden is on the plaintiff to demonstrate his eligibility for consideration of a civil money penalty, the imposition of which is still merely discretionary with the Secretary, if the plaintiff proves he has complied with the regulatory criteria. In this case, the Secretary determined that the plaintiff had not so proven and the court, on de novo review, agrees.

Conclusion

For the foregoing reasons, therefore, the court finds that the

plaintiff has failed to carry his burden herein of proving by a preponderance of the evidence that he was and is in compliance with the laws and regulations of the USDA FNS so as to render him eligible for consideration for a civil money penalty in lieu of permanent disqualification from participation in the Food Stamp Program. Consequently, defendant's Motion for Summary Judgement is ALLOWED and plaintiff's Motion for Summary Judgment is DENIED.

SO ORDERED. This _____ day of December, 1993.

/s/ James C. Fox
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 5, 1995

No. 94-1117
CA-92-176-7-F

JAMIL SALEH, d/b/a/ KB's Limited Fine Foods

Plaintiff - Appellant

v.

UNITED STATE OF AMERICA

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court of the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the court,

/s/ Bert M. Montague
CLERK

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE
4110 Wake Forest Road, Suite 210
Raleigh, NC 27609 (919)790-2927

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Jamil Saleh, Owner
K B's Limited Fine Foods
608 Castle Street
Wilmington, North Carolina 28401

Dear Mr. Saleh:

Your firm has been investigated by U.S. Department of Agriculture investigators. From this investigation there is evidence that certain violations of the regulations governing the Food Stamp Program, 7 CFR 270-282 (hereinafter referred to as the regulations) have occurred in your firm. Based on the transactions which occurred during this investigation we are charging you, doing business as K B's Limited Fine Foods, with the following violations:

1. On August 28, 1991, a clerk identified as Dameen Mohd Qasim

Mohammad, accepted $100.00 in food coupons in exchange for $60.00 in cash. The acceptance of food coupons in exchange for cash was in violation of Section 278.22(a) of the regulations.

2. On September 4, 1991, a clerk identified as Dameen Mohd Qasim Mohammad, accepted $200.00 in food coupons in exchange for $100.00 in cash. The acceptance of food coupons in exchange for cash was in violation of Section 278.2(a) of the regulations.

Because of the seriousness of these charges, your firm is being considered for permanent disqualification from the Food Stamp Program or for the imposition of a civil money penalty.

Your firm is liable for the trafficking (exchange of food stamps for

cash) violations notes in items 1 and 2, above. The sanction for these violations, as provided by Section 278 .6(e)(1)(i) of the regulations, is permanent disqualification. However, a government regulations published in the FEDERAL REGISTER on Tuesday, May 2, 1989, provides that under certain conditions, the Food and Nutrition Service may impose a civil money penalty of up to $20,000 in lieu of permanent disqualification of a firm for trafficking. In order for you to be eligible for this civil money penalty, there must be substantial evidence that your firm had an effective policy and program in effect to prevent violations. Specific criteria for establishing that such a program exists are detailed in Section 278.6(i) of the enclosed regulations. You must meet each of the four criteria listed and are

required to provide the documentation as specified. You must submit your request for a civil money penalty, as well as the required documentation, to this office within 10 days of your receipt of this letter in order to be eligible for consideration. If your request and the required documentation are not submitted timely, you will lose your right for any further consideration for a civil money penalty. If it is determined that you qualify for a civil money penalty, the amount of that penalty will be $20,000 which you will be required to pay in full within 30 days of your receipt of the demand for payment.

If you are not eligible for a civil penalty, or if you are eligible but do not submit the full payment within the required time period, the penalty would be a permanent disqualification.

In addition to applying for a civil money penalty, if you so elect, you may present any information, explanation, or evidence you have regarding these charges. This information also must be submitted within 10 days of your receipt of this letter.

We will fully consider your reply and any documentation you provide before we make a final decision in this matter. However, if we do not hear from you within the times indicated, we will make our decision based on the information available to us, and advise you of the decision in writing. Section 278.2 of the enclosed regulations spells out the procedures we will follow in making a decision in the case.

Sincerely,

/s/ R. Calvin Thompson

Acting Officer-in-Charge

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Mr. R. Calvin Thompson
Acting Officer-in-Charge
United States Department of
Agriculture Food and
Nutrition Service
4110 Wake Forest Road
Suite 210
Raleigh, NC 27609

Re: KB's Limited Fine Foods

Dear Mr. Thompson:

I represent K B's Limited Fine Foods. Jamil Saleh, owner of K B's Limited Line Foods, received your charge letter on August 3, 1992. Please consider this letter the response of K B's Limited Fine Foods, pursuant to 7 CFR part 278.

Dameen Mohd Qasim Mohammad was a part-time clerk at K B's Limited Fine Foods. He pled guilty to one count of food stamp fraud on May 26, 1992. Pursuant to the provisions of his suspended sentence, Mr. Mohammad paid

$200.00 in restitution to the United States Department of Agriculture, as well as a $1,000.00 fine to the United States. The appropriate penalties have been paid.

Jamil Saleh had no knowledge of any of the above until March of 1992, when Dameen Mohammad was first charged. Mr. Saleh has owned and operated K B's Limited Fine Foods since May of 1987. He started this grocery store business on his own. Mr. Saleh has a wife and four children to support. He has never been in any kind of trouble and he has done nothing at this time to warrant any sanction. K B's Limited Fine Foods has participated in the United States Department of Agriculture's Food Stamp Program since May, 1987. During this time, there have not been any violations or alleged violations of the Food Stamp Program's provisions by K B's Limited

Fine Foods. Mr. Saleh operates a legitimate and honest business and there has never been any question as to his or the store's integrity and reputation as a respectable business.

Based on the above, because Mr. Saleh has shown by substantial evidence that his store fulfills each of the criteria set forth in 7 CFR 278.6(i), his store should be assessed a civil penalty, if any, in lieu of the permanent disqualification sanction. A disqualification of K B's Limited Fine Foods from participating in the food stamp program would be extremely unfair. It would result in a substantial hardship to eligible households that shop at this store.

Mr. Thompson, if there was ever a situation where a warning letter was the appropriate sanction, this must certainly

be it. Mr. Saleh has been very upset by this turn of events. A permanent disqualification would simply devastate him. A civil penalty would likely put him out of business. We would certainly urge you, however, to consider a civil penalty over a permanent disqualification. We would urge you most strongly, however, to determine that a warning letter, as provided in 7 CFR 278.6(e)(7) is the most appropriate, fair, reasonable and just resolution to this most unfortunate event.

I will be happy to answer any questions you may have or to forward any additional documentation you may require for your determination.

Sincerely,
ZIMMER AND ZIMMER

/s/ Maura A. McCaughey

MAM/lam
Enclosures

AFFIDAVIT OF JAMIL SALEH

1) That I, Jamil Saleh, am a citizen and resident of New Hanover County, North Carolina.

2) That I am the owner, manager and operator of K B's Limited Fine Foods, which is located at 608 Castle Street, Wilmington, New Hanover County, North Carolina.

3) That I have owned and operated K B's Limited Fine Foods since in or about May, 1987.

4) That K B's Limited Fine Foods is a participating retail food store in the United States Department of Agriculture's Food Stamp program, and has been since in or about May, 1987.

5. That I am fully aware of the laws and regulations regarding the food stamp program and that K B's Limited

Fine Foods has never violated any of those laws or regulations.

6. That I have no full time employees, nor have I ever had a full time employee.

7. That I have one part-time employee as a clerk and that I currently have a different part-time employee as a clerk.

8. That I made sure, and continue to make sure, that each of these part-time clerks were and are aware of the laws and regulations regarding the food stamp program, especially that the exchange of food stamps for cash and the redemption of food stamps for non-food items are violations of the food stamp laws.

9. That to the best of my ability, I oversee the actions of these part-time clerks and attempt to make sure

that they are not violating any of the laws or regulations of the food stamp program.

10. That approximately three (3) weeks ago I completed my renewal for application to the United States Department of Agriculture, Food and Nutrition Service, for continuing participation in the food stamp program.

11. That I knew nothing about any alleged violations of the food stamp laws by any of my employees until Dameen Mohd Qasim Mohammad was first charged with violating the food stamp laws.

This the _____ day of _____, 1992.

/s/ Jamil M. Saleh

Sworn to and subscribed

before me this the _____

day of _____, 1992.

/s/ Laura H. Maher

My Commission Expires:

_____

AFFIDAVIT OF DAMEEN MOHD QASIM MOHAMMAD

1. That I, Dameen Mohd Qasim Mohammad, am a citizen and resident of New Hanover County, North Carolina.

2. That I was once employed as a part-time clerk at K B's Limited Fine Foods, which is located at 608 Castle Street, Wilmington, New Hanover County, North Carolina.

3. That I pled guilty to one count of food stamp fraud in the United States District Court, in the Eastern of North Carolina on May 26, 1992.

4. That the circumstances of this action were that I paid for food stamps myself, and that I bought food with the food stamps to feed my family.

5. That, Jamil Saleh, the owner of K B's Limited Fine Foods, and my boss,

did not know, and was not aware of my activities.

6. That I am no longer employed at K B's Limited Fine Foods.

This the _____ day of _____, 1992.

/s/ Dameen Mohd Qasim Mohammad

Sworn to and subscribed
before me this the _____
day of _____, 1992.

/s/ Laura A. Maher
Notary Public

My Commission Expires:

_____

UNITED STATES DEPARTMENT OF AGRICULTURE

FOOD AND NUTRITION SERVICE
4110 Wake Forest Road, Suite 210
Raleigh, NC 27609 (919) 790-2929

August 20, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Jamil Saleh, Owner
KB's Limited Fine Foods
608 Castle Street
Wilmington, North Carolina 28401

Dear Mr. Saleh:

Careful consideration has been given to the information and evidence available to us relating to our letter of charges dated July 31, 1992, and your attorney's reply on august 7, 1992, to that letter.

On the basis of the evidence, we find that the violations, as outlined in our letter of charges to you did, in fact, occur at your firm. These violations consisted of Dameen Mohd Qasim Mohammad accepting a total of $300.00 in food coupons in exchange for a total of $170.00 in cash.

IN REGARD TO THESE VIOLATIONS WE HAVE CAREFULLY REVIEWED YOUR REQUEST FOR A CIVIL MONEY PENALTY IN LIEU OF PERMANENT DISQUALIFICATION AND THE DOCUMENTATION YOU PROVIDED WITH THAT REQUEST. IT IS OUR FINDING THAT THERE IS NOT SUBSTANTIAL EVIDENCE THAT YOUR FIRM HAD AN EFFECTIVE POLICY AND PROGRAM IN EFFECT TO PREVENT VIOLATIONS. YOU FAILED TO SUBMIT DOCUMENTATION OF TRAINING ACTIVITY THROUGH DATED TRAINING RECORDS AND RECORDS OF DATES TRAINING SESSIONS WERE CONDUCTED AS REQUIRED BY SECTION 278.6 (I) (2) OF THE REGULATIONS. ALSO, SECTION 278.6 (I), CRITERION 2, OF THE ENCLOSED REGULATIONS PROVIDES THAT THE POLICY AND PROGRAM SHALL HAVE BEEN IN EFFECT PRIOR TO THE OCCURRENCE OF VIOLATIONS.

You are hereby notified that in accordance with Section 278.6(e)(1) of

the Food Stamp Program Regulations, KB's Limited Fine Foods is permanently disqualified from the Food Stamp Program. This determination will become effective on the 10th calendar day following your receipt of this notice. If the 10th calendar day is a Saturday, Sunday or legal (Federal) holiday, the disqualification will be effective the next date which is not a Saturday, Sunday, or legal (Federal) holiday. This action is taken under the authority of Section 278.6(a) of the regulations governing the Food Stamp Program.

Your authorization card, number 8455635, all unused redemption certificates, and all posters, forms, and other official material relating to the program must be mailed no later than the third banking day after the above-described effective date to Gerald D.

Holt, Officer-in-Charge, USDA, Food and Nutrition Service, 4110 Wake Forest Rd., Suite 210, Raleigh, North Carolina. Failure to promptly return the material requested could jeopardize any future reauthorization.

KB's Limited Fine Foods may not accept food coupons after the close of business on the effective date of disqualification. Banks and wholesalers will be notified not to accept food coupons from your firm after the third banking day following the effective date of this order. Any food coupons on hand at the close of business on the effective date must be redeemed within 3 banking days after the effective date.

According to Section 278.6(f)(2) of the regulations, in the event a retail food firm which has been disqualified is sold or the ownership thereof is

otherwise transferred, you, as former owner, would then be subjected to and liable for a civil money penalty calculated using the method found in section 278.6(g). As your firm has been permanently disqualified, the civil money penalty would be double for a 10-year disqualification period. This civil money penalty is a debt owed the Government and interest will accrue if not paid within 30 days of billing date.

THE DETERMINATION TO DENY YOUR REQUEST FOR A CIVIL MONEY PENALTY AND TO IMPOSE A PERMANENT DISQUALIFICATION will be final unless you submit a timely written request for review to the Director Administrative Review Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 304, Alexandria, Virginia, 22302. Your request for review

must be postmarked by midnight of the 10th calendar day after your receive this notice, in order to considered timely. If the 10th day of the period for requesting review falls on Saturday, Sunday, or legal (Federal) holiday, as specified in Section 279.5 of the regulations, a request for review will be timely if it is postmarked the next day which is not a Saturday, Sunday, or legal (Federal) holiday.

If a timely request for review is made, you may continue to accept and redeem food coupons until a decision on your request has been made by the review officer. The rules governing your review rights are contained in Section 278.8 and Part 279 of the Food Stamp Program Regulations.

This determination shall not preclude the Department of Agriculture or

any other agency or department of the United States from taking further action to collect any claim determined under the regulations governing the Food Stamp Program or under any other pertinent statutes or regulations, nor shall this determination preclude prosecution under any applicable penal statutes.

Sincerely,
/s/ R. Calvin Thompson
Acting Officer-in-Charge
Enclosure

August 31, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Director, Administrative Review Division
Food and Nutrition Service
U.S. Department of Agriculture
3101 Park Center Driv , Room 304
Alexandria, VA 22302

Re: Request for Review
KB's Limited Fine Foods

Dear Sir:

On August 22, 1992, Mr. Jamil Saleh, owner of KB's Limited Fine Foods in Wilmington, North Carolina, (hereinafter "KB's") received notice that the store is permanently disqualified from the Food Stamp Program. On behalf of KB's Limited Fine Foods, we hereby request a review of this decision.

For your review, I am enclosing copies of 1) the charge letter by the FNS regions office in Raleigh, North Carolina; 2) the response, with enclosures, of KB's and 3) the letter

imposing permanent disqualification from further participation in the Food Stamp Program, signed by Calvin Thompson, Acting Officer-in-Charge, dated August 20, 1992 and received August 22, 1992.

We request that you reverse the decision of the FNS regional office in Raleigh and order the regional office to send a warning letter to Jamil Saleh pursuant to 7 CFR 278.6(e)(7).

The facts here involve a single violation by Dameen Mohammad a former part time clerk. Because of his actions, Mr. Saleh fired Dameen Mohammad. No employee before or since this event has ever been charged or convicted with any violation of the Food Stamp program. The violation here was an isolated event, limited to the former part-time clerk. The scope of the violation was narrow; the dollar amount of food stamps involved

was minimal. A warning letter would have been the most appropriate action for the agency to take; it is the most appropriate action for you, as the Director, to order the regional office to take.

The regional office made no response to our request for a warning letter. Rather, the regional office found, unreasonably that KB's did not present substantial evidence to warrant imposition of a civil penalty in lieu of permanent disqualification.

As stated in our August 7, 1992, response to Mr. Thompson's charge letter, a warning letter is the most appropriate action for the USDA to take in this situation.

If, however, you determine that a warning letter is not the action you wish to take, we hereby present the

substantial evident previously presented to the regional office as to why a civil penalty should be imposed in lieu of permanent disqualification.

KB's presented substantial evidence to the FNS regional office of its fulfillment of each of the criterion listed in 7 CFR 278.6(i). Criterion One states that "the firm shall have developed an effective compliance policy as specified in 278.6(i)(1)." This subsection provides that the FNS shall consider policy statements "which reflect a commitment to ensure that the firm is operated in a manner consistent with [the regulations]." The affidavit submitted by and sworn to by Jamil Saleh clearly sets forward this policy and sets forward the fact that this business is not only a sole proprietorship, but a solely run, managed and operated sole proprietorship.

Mr. Saleh is at the store during all open hours. He employees a part time clerk. With this kind of operation, there is no need for memoranda of store policy and procedures, as there would in a larger firm with employees.

Subsection 7 CFR 278.6(e)(1) further provides additional consideration in (i) through (vi). KB's has shown compliance with (1)(i) - termination of any employee found violating FSP regulations; (1)(ii) and (iii) - continued operation of firm policy for corrective action and internal review; (1)(iv) - the limited nature and scope of the violation; and (v) the fact that no violation nor any alleged violation has ever been asserted against this firm.

Criterion Two requires KB's to "establish that both its compliance policy and program were in operation at

the location where the violation occurred prior to the occurrence of violations." KB's satisfied this criterion in its response to the regional office. See Affidavit of Jamil Saleh.

Criterion Three is that the firm had developed and instituted an effective personnel training program in accordance with 7 CFR 278.6(i)(2) which requires evidence of training activity of employees including the clearly imparted instruction that the exchange of food stamps for cash is prohibited. As required by 7 CFR 278.6(i)(2), KB's had developed and implemented an effective training program for all its employees. See Affidavit of Jamil Saleh. KB's documentation of this training program is evidenced by the affidavit. As previously explained, KB's is a small, closely run store. Mr. Saleh is the

owner and operator of KB's. He is there every day from opening to close. He has documented that he is aware of the rules and regulations of the Food Stamp Program and that he makes sure that his part-time clerks, if any, are aware of and trained in a knowledge of the rules and regulations. KB's presented substantial evidence of compliance with this criterion.

Criterion Four is that "neither the firm ownership nor management is aware of, approved of, benefitted from or were in any way involved in the conduct or approval of trafficking violations." As set forth in our response to the regional office, Mr. Saleh had no knowledge of Dameen Mohammad's actions. He did not condone or approve of Dameen Mohammad's actions. He did not condone or approve of Dameen Mohammad's actions. See

Affidavits of Jamil Saleh and Dameen Mohammad for substantial evidence of KB's compliance with this criterion.

We are submitting no additional information for you to review but ask that you consider this letter, our letter of August 7, 1992 to the regional office and the Affidavits of Jamil Saleh and Dameen Mohammad.

We ask you, upon your review of the record, to order the regional office in Raleigh to issue a warning letter to KB's or, in the alternative, to issue a civil penalty. Permanent disqualification is clearly not appropriate in this situation. "A store may not be disqualified where an employee acts solely for his own personal gain and actively conceals his conduct from the owner." R. Ranch Market Corp. v. United States, 861 F2d 236, 241 (9th Cir. 1988).

Thank you for your attention to this matter and I look forward to hearing from you.

Sincerely,

Maura A. McCaughey

MAM/lam
cc: Jamil Saleh

ADMINISTRATIVE REVIEW DIVISION
1100 COMMERCE STREET
DALLAS, TEXAS 75242

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Maura A. McCaughey
Attorney at Law
ZIMMER AND ZIMMER
111 Princess Street
Wilmington, North Carolina 28401-3997

Re: Jamil Saleh, Owner
KB's Limited Fine Foods
Wilmington, NC

Dear Ms. McCaughey:

I have completed an administrative review of USDA's proposal to permanently disqualify the referenced firm from participation in the Food Stamp Program. My review has encompassed USDA investigative and administrative records reflecting the basis for the proposed penalty together with the information that you have provided on your client's behalf.

The record before me shows that the proposed penalty is based on findings of

a formal USDA investigation, conducted to assess this firm's compliance with federal law and regulations governing the Food Stamp Program. Investigative records contain documentation of two instances of trafficking in which a total of $300 in food coupons was exchanged for $170 cash by Dameen Mohammad, a clerk at your client's firm, in transactions with a USDA investigative aide. These transactions occurred on August 20 and September 4, 1991.

Based on the findings of this investigation, administrative charges were lodged against the firm by USDA, and your client was subsequently notified that a permanent disqualification would be imposed. However, with the granting of a request for administrative review, implementation of the penalty was placed in abeyance pending a final determination

on the matter, and your client's firm has continued uninterrupted participation in the Food Stamp Program during the pendency of this appeal.

Your letter of August 7, 1992, responded to the charge letter dated July 31, 1992. Your client had no knowledge of the violations, you said, and that the clerk involved in trafficking offenses paid restitution and a fine and no longer works for him. Your client has participated in the food stamp program since opening his firm in May of 1987. He has never been in any trouble, and his honesty and integrity have never been questioned. If USDA determines that a sanction is necessary, you requested a civil money penalty in lieu of permanent disqualification of your client. You described the operations of your client's firm, explained why there were not

written policies regarding food stamps and enclosed an affidavit from him. In this affidavit, your client states that he is fully aware of program rules and that, to the best of his ability, he oversees the actions of his employees to prevent violations.

The foregoing is a summary of the information that has been provided in support of your client's position. Please be assured that in reaching a decision on the penalty at issue in this case, I have given full attention and consideration to all of this information.

In addressing this matter, I would state first that based on my study of investigative documentation, I find that the program violations with which your client's firm is charged are supported by substantial credible evidence. As previously pointed out herein, these

charges resulted from specific findings of a formal USDA investigation. The violative transactions cited in the charges were conducted directly with a USDA investigative aide and were documented at the times of occurrence. I find this documentation to be clear and complete in regard to all significant aspects of the violations. I must therefore conclude that the administrative charges at issue are valid.

I would further state that the violative activity in which occurred at your client's firm represents a substantial degree of noncompliance with the federal statute and regulations governing the Food Stamp Program. Trafficking in food stamps by participating firms subverts the Congressional intent of the program by

diverting appropriated public funds away from the intended purpose of providing food assistance to low-income families. Such activity diverts public funds, instead, to the fraudulent financial gain of violators. Thus, participation in the program by violating firms serves to defeat its basic objective, rather than contributing toward its achievement.

Part 278.6(e)(1)(i) of the USDA Regulations pursuant to the Food Stamp Act requires that a firm be permanently disqualified from the Food Stamp Program when investigative evidence establishes that "personnel of the firm have purchased coupons or trafficked in coupons . . . " As set forth in internal USDA policy guidelines, the national policy based on this requirement provides that "the purchase of any amount of food coupons . . . for any amount of cash

shall warrant permanent disqualification, regardless of whether or not the firm benefited from the violation, or the owner or management of the firm had knowledge of the violation."

Since the facts of record in this case are consistent with this regulatory specification and the national policy based thereupon, I am sustaining the permanent disqualification of your client's firm from participation in the Food Stamp Program. In accordance with provisions of the Act and USDA Regulations, my determination in this matter shall become effective 30 days form your receipt of this letter.

My decision to sustain permanent disqualification in this case is rendered in full consideration of Part 278.6(f) of the USDA Regulations, which provides for imposition of civil money penalties in

lieu of disqualification in situations where disqualification would cause hardship to food stamp households because of an unavailability of other participating food stores to meet their needs. This regulatory provision sets forth a specific exception: "A civil money penalty may not be imposed in lieu of a permanent disqualification." In view of this exception, substitution of a civil money penalty for disqualification is expressly prohibited in this case. Further, I must concur with the Raleigh office's determination that your client does not qualify for a civil money penalty in lieu of permanent disqualification under Part 278.6(i) of program regulations.

Please note that Section 14 of the Act and Part 279.10 of the USDA Regulations insure your client's right to

a judicial review of my determination in this case. If judicial review is desired, complaint, naming the United States as defendant, must be filed in United States District Court of the federal judicial district in which he resides or is engaged in business, or in a state court of record having competent jurisdiction. Complaint must be filed within 30 days of your receipt of this letter.

Sincerely,

/s/ Grady W. Smithey, Jr.

Administrative Review Officer

bcc: FNS Field Office, Raleigh, NC

ARD, Alexandria, VA

7 U.S.C. 2021. Civil money penalties and disqualification of retail food stores and wholesale food concerns

(a) Disqualification or civil penalty. Any approved retail food store or wholesale food concern may be disqualified for a specified period of time from further participation in the food stamp program, or subjected to a civil money penalty of up to $10,000 for each violation if the Secretary determines that its disqualification would cause hardship to food stamp households, on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this Act or the regulations issued pursuant to this Act.

(b) Period of disqualification. Disqualification under subsection (a) shall be

...

(3) permanent upon-

(A) the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern, except that the Secretary shall have the discretion to impose a civil money penalty of up to $20,000 for each violation (except that the amount of civil money penalties imposed during a 2-year period may not exceed $40,000) in lieu of disqualification under this subparagraph, for such purchase of coupons or trafficking in coupons or cards that constitutes a violation of the provisions regulations issued pursuant to this Act, If the Secretary determines that there is substantial evidence (including evidence that neither the

ownership nor management of the store or food concern was aware of, approved, benefited from, or was involved in the conduct or approval of the violation) that such store or food concern had an effective policy and program in effect to prevent violations of the Act and the regulations;.....

7 CFR 278.6(i) Criteria for eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking in food coupons, ATP cards or other Program benefit instruments if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program. Firm assessed a CMP under this paragraph shall be subject to the applicable penalties included in 278.6(e)(2) through (6) for the sale of ineligible items. Only those firms for which a permanent disqualification for trafficking took effect are eligible for a civil money

penalty in lieu of permanent disqualification for trafficking, except that firms that have been disqualified but are awaiting a judicial review decision are eligible for a civil money penalty in lieu of a permanent disqualification. In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred

prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 278.6(i)(2); and

Criterion 4. Neither the firm ownership nor management were aware of, approved, benefitted from, or were in any way involved in the conduct or approval of trafficking violations. For purposes of this section, a person who holds the title of manager is considered to be a part of firm management if that individual carries out either of the following responsibilities: (1) Personnel functions such as hiring, firing, or evaluating employees, or (2) financial functions that include completing Redemption Certificates for

food coupon deposits or closing out daily cash receipts.

(1) Compliance policy standards. As specified in Criterion 1 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this Part 278 of current FSP regulations and current FSP policy on the proper acceptance and handling of food coupons. As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness

of the firm's policy and program to ensure FSP compliance and to prevent FSP violation, FNS may consider the following:

(i) Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;

(ii) Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregularities committed by firm personnel;

(iii) Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations;

(iv) The nature and scope of the

violations charged against the firm;

(v) Any record of previous firm violations charged against the firm; and

(vi) Any other information the firm may present to FNS for consideration.

(2) Compliance training program standards. As prescribed in Criterion 3 above, the firm shall have developed and implemented an effective training program for all managers and employees on the acceptance and handling of food coupons in accordance with this Part 278. A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating

employee(s) in initial and any followup training held prior to the violation(s). FNS shall consider a training program effective if it meets or is otherwise equivalent to the following standards:

(i) Training for all managers and employees whose work brings them into contact with food stamps or who are assigned to a location where food stamps are accepted, handled or processes shall be conducted within one month of the institution of the compliance policy under Criterion 1 above. Employees hired subsequent to the institution of the compliance policy shall be trained within one month of employment. All employees shall be trained periodically thereafter

(ii) Training shall be designed to establish a level of competence that assures compliance with Program requirements as included in this part

278;

(iii) Written materials, which may include FNS publications available to all authorized firms, are used in the training program. Such materials shall clearly state that the exchange of food coupons, ALP cards or other benefit instruments for cash is prohibited and in violation of the Food Stamp Act and regulations.